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No. 78-1547

In the Supreme Court of the United States

OCTOBER TERM, 1978

SUN OIL COMPANY OF PENNSYLVANIA, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A43-A49) is reported at 592 F.2d 563. The opinion of the district court (Pet. App. A11-A42) is reported at 17 F.E.P. Cases 1577.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1979 (Pet. App. A50), and the pe-

tition for a writ of certiorari was filed on April 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether dismissal of a suit brought by the Secretary of Labor under Section 7(b) of the Age Discrimination in Employment Act, 29 U.S.C. 626(b), is required if the district court finds that further conciliation efforts are possible.

STATUTE INVOLVED

Section 7(b) of the Age Discrimination in Employment Act, 29 U.S.C. 626(b), provides in pertinent part:

> In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

STATEMENT

1. On May 29, 1973, Emory Osgood, a former employee of petitioner, notified the Secretary of Labor of his intent to sue petitioner for forcing him to take early retirement in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (II R. 91).[1] Two days later, J. Dean Speer, a Department of Labor compliance officer, notified petitioner of Osgood's claim and requested a meeting to "try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion" (II R. 90).

The first meeting took place on June 18 between Speer and petitioner's representatives, including Robert Webster (II R. 17, 25). Speer outlined the substance of Osgood's charges and sought to ascertain petitioner's position (II R. 17, 23). Petitioner asserted that Osgood had "elected early retirement" (II R. 22-23). Although the discussion focused on Osgood (I R. 99), petitioner's representatives mentioned three other persons later named in the Secretary's complaint: Sokol, Tolbert, and McKee (I R. 100; II R. 23-24). These persons held "similar positions to Osgood" and had also retired early (II R. 24, 25).

In response to Speer's suggestion that Osgood be reemployed and paid lost wages, petitioner's representatives stated that they did not believe there had

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[1] "R." refers to the two volumes of the record in the court of appeals, copies of which have been lodged with the Clerk of this Court.

been a violation of the Act (II R. 17). No settlement was reached at this meeting. Speer stated that he would investigate further and that they would meet again (II R. 17-18, 26).

In the ensuing months, Speer had several conversations with Osgood and others, including a former official of petitioner (II R. 27, 46, 72-73), and with Sokol, who had been discharged at age 54 under circumstances "much the same" as Osgood (II R. 29-30, 46). On October 1, 1973, Speer wrote to Webster requesting specific information on managerial employees of petitioner's Marketing Division both before and after petitioner's 1972 reorganization of that division (II R. 96-97).

On October 25, 1973, Webster responded with the requested information (II R. 99-103). Based on analysis of that information, Speer called Webster in early December and requested remedial action in the form of reemployment or a cash settlement for Osgood and Sokol (II R. 36-37). Webster gave an "unequivocal response" that petitioner would not take such remedial action (II R. 36-38, 68-69). Speer asked Webster for "anything he wished to submit with respect to Mr. Sokol," but nothing further was ever offered (II R. 37). Speer then advised Webster that the file would be forwarded to the Labor Department's legal office for analysis and a decision about what action should be taken (II R. 38).

The Solicitor of Labor returned the file in July 1974, with "advice and instructions" for additional information that should be developed (II R. 39).

Speer investigated further (II R. 39-40) and learned that one of the Department's compliance officers in Philadelphia was conducting a nationwide investigation of age discrimination throughout petitioner's Marketing Division (II R. 59-60). Speer and Eliot Johnson, the Philadelphia compliance officer, agreed that Speer would handle matters relating to the discharge of Regional Marketing Managers and Assistant Managers (II R. 61-62).

From July to October 1974, Speer continued his investigation, meeting with petitioner's officials to determine the scope of the forced retirements arising out of petitioner's 1972 Marketing Division reorganization (II R. 32-35, 55-56, 63-69). On completion of the investigation, Speer called Webster and told him that the investigation had been completed and that they should meet to discuss the findings (II R. 47).

On October 23, 1974, Webster and Speer met in Dallas (II R. 48, 56). Speer advised Webster of the finding that petitioner had engaged in a pattern of age discrimination with regard to seven named former employees (II R. 47-50). He told Webster that none of these persons had elected retirement, as petitioner maintained, but instead each had "resisted separation" and all but one of them had been replaced by younger men (II R. 50). Speer asked Webster whether he would be "agreeable to making some resolution of these cases," including "re-employment of the seven individuals in question, and * * * compensation for damages through lost income that

these individuals suffered" (II R. 53-54). A detailed estimate of back wages in excess of $200,000 was provided (II R. 54; see II R. 104). Webster stated that he was "not in a position to enter into any agreements," but that he would like to "review the matter" and would be prepared to discuss it "at some subsequent period" (II R. 54).

Speer told Webster that the Labor Department was willing to continue negotiations, but that the two-year statute of limitations would expire on December 1, 1974, for several persons. Speer said that if petitioner would waive the statute of limitations negotiations could continue beyond that date (II R. 54-55, 57-58).

Webster responded that he would discuss the matter with petitioner's general counsel and provide an answer in five days (II R. 55, 58). Speer stated that if there was no agreement on a waiver, the file "would be submitted to the Solicitor's Office and assuming that everyone [there] agreed, the suit would be entered" (II R. 57, 58).

Not having heard from Webster, Speer called him on November 5 (II R. 56). Webster indicated that he had not received a reply from petitioner's general counsel on the waiver of the statute (II R. 57). Speer again contacted Webster on November 13, and was told that petitioner would not agree to waive the statute (II R. 57-58). This action was filed on November 27, 1974 (I R. 5).

2. The district court concluded that the Secretary, before filing suit, had not adequately "at-

tempt[ed] to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of th[e] Act through informal methods of conciliation, conference, and persuasion" as required by Section 7(b). Holding that such "attempted conciliation is a jurisdictional prerequisite to maintaining suit" under the Act (Pet. App. A38), the district court granted petitioner's motion for summary judgment and dismissed the complaint with prejudice (Pet. App. A41).

The court of appeals reversed (Pet. App. A43-A49). Although it agreed with the district court that, "[b]y insisting on waiver of the limitations period as a condition to further negotiations, [the Secretary] prematurely restricted the conciliation process and thus failed to fully exhaust the informal enforcement avenues as contemplated by § 7(b)" (Pet. App. A47), the court of appeals stated (*id.* at A49):

> In the instant case the Labor Department officials made a substantial initial effort to effect voluntary compliance. In particular, [the Secretary] informed the [petitioner] of the specific allegations of misconduct and what action was required to comply with the Act. While [the Secretary's] efforts fell far short of what might reasonably be considered "exhaustive," there was nevertheless a sufficient attempt at conciliation to meet the minimum jurisdictional requirement.

In those circumstances, the court of appeals concluded, "[t]he drastic step of dismissal in this action is incompatible with the humanitarian nature of

the Act," and "the proper course is to stay proceedings until * * * informal conciliation can be concluded" (*id.* at A48).

ARGUMENT

The decision of the court of appeals is correct. Its holding is supported by this Court's decision in *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), and there is thus no reason for further review.

1. In *Oscar Mayer*, the Court held, an aggrieved person had filed his federal suit under the Age Discrimination in Employment Act prematurely, before pursuing state remedies that the Act required to be pursued. This was not, however, a reason for dismissing the suit; the Court concluded that the suit should be held in abeyance while the state remedies were invoked (slip op. 7-14). Here, too, any procedural default committed by the Secretary can be cured by holding the suit in abeyance while further attempts are made to conciliate. The court of appeals therefore acted correctly in reversing the district court's judgment dismissing the suit.

Petitioner asserts, however, that the court of appeals' reasoning conflicts with that of *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). Although any conflict among the circuits that may have predated *Oscar Mayer* is of no more than academic concern,[2] petitioner's assertion is incorrect.

[2] It is unlikely that any court would follow *Ace Hardware* after the decision in *Oscar Mayer*.

Ace Hardware recognized the equitable power of a district court to stay an action under the Act to allow further conciliation efforts (495 F.2d at 376). The court concluded that, on the facts of that case, the district court's refusal to grant a stay was not an abuse of discretion (*ibid.*). In that case, the Secretary had "let the case lay [*sic*] dormant for almost four months" and then filed suit without making a final settlement attempt; the employer had not been informed that back wages should be paid to the victim of the discrimination or that the case was being referred for review and possible legal action; and the employer had not been given an opportunity to respond (at least orally) to the violation in light of a "make whole" remedy (*id.* at 375). The court of appeals in this case did not question the reasoning of *Ace Hardware* (see Pet. App. A47). It instead determined, on the basis of the facts before it, that the Secretary here made "a substantial initial effort to effect voluntary compliance" before suit was filed (Pet. App. A49). The holding that, in these circumstances, a district court should stay proceeding to allow conciliation to proceed simply recognizes that dismissal is not always appropriate merely because the possibility of conciliation remains.[3]

[3] The decision does not conflict with any appellate decision under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), (f)(1). The Title VII appellate decisions cited by petitioner (Pet. 13 n.7) hold only that a suit brought by the EEOC before any attempt at conciliation is premature.

2. The decision below does not encourage or excuse delays in the conciliation process. Under the statutory scheme, the Secretary has two (and, if the violations are willful, three) years from the date of the violation in which to file suit (29 U.S.C. 255, 626(e)). During this period, the Secretary must investigate the alleged violations, attempt to achieve voluntary compliance, and if there is no voluntary compliance, prepare the case for litigation. There is no requirement that any of these steps be completed within a shorter period of time. The nature of the Secretary's response to a particular charge of discrimination, the scope of investigation and conciliation efforts with a nationwide employer that has many employees, and the priority given to a particular case at any stage in its development are peculiarly within the Secretary's discretion. Cf. *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979).

This Court has repeatedly refused to dismiss proceedings under the National Labor Relations Act because of lengthy delays in processing by the Labor Board, saying "[i]nordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except [the six months for filing the charge] in § 10(b)." *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962), and cases there cited. The Court has therefore refused "to place the consequences of [the Board's] delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S.

258, 265 (1969). This principle applies here.[4] Dismissing this action for delay in settlement negotiations, even if the delay caused some prejudice to petitioner, would be tantamount to applying a second statute of limitations, which is not found in the Act. Any "prejudice" suffered by the defendant because of loss of memories, scattering of witnesses (see I R. 76) and so forth is confined to acceptable levels by the statute of limitations. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 427-428 (1965). Petitioner here has received all the protection that Congress determined necessary and cannot claim additional protection from prejudice allegedly suffered as a result of the time consumed by the required pre-suit settlement attempts. As this Court recently recognized, "[t]he ADEA's limitations periods are set forth in explicit terms * * * [and] adequately protect defendants against stale claims." *Oscar Mayer & Co.* v. *Evans*, *supra*, slip op. 10-11.

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[4] Like Title VII of the Civil Rights Act of 1964, on which it is patterned in many respects (see *Oscar Mayer & Co.* v. *Evans*, *supra*, slip op. 3), the Act states the applicable time limitations "with precision." *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). In the Title VII context, this Court has accordingly stated that it "will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). See also *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977) (federal agencies are subject to statutes of limitations only if Congress explicitly so provides).

3. As the court of appeals recognized (Pet. App. A48), given the "significant effort [in this case] by the Secretary to effect voluntary compliance" before filing suit, "[t]he drastic step of dismissal in this action is incompatible with the humanitarian nature of the Act." It would deprive the aggrieved employees of their remedies solely because of defects in the Secretary's conciliation efforts, over which they had no control.

Dismissal of the suit, and the concomitant extinguishment of the rights of the aggrieved employees,[5] would be a sanction far out of proportion to any defect in the Secretary's efforts to settle the case without resort to litigation. It would also be at odds with the purpose of the conciliation requirement. There is no reason to assume that Congress, by affording employers the opportunity voluntarily to correct violations, created a tool to enable employers to evade corrective action.

[5] Section 7(b) of the Act incorporates by reference Section 16(c) of the Fair Labor Standards Act, 29 U.S.C. 216(c), which provides, in pertinent part: "The right * * * to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this [Act] * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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